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Unions

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WAGE AND HOUR LAW

Faulty trial-management plan warrants reversal of $15 million award

by Michael Futterman and Jaime Touchstone

A group of employees sued U.S. Bank for misclassifying them as exempt from overtime. The trial court certified the lawsuit as a class action and devised a trial-management plan based on "sampling," in which only a small group of employees testified on behalf of the entire class. The employees prevailed, and the trial court awarded them $15 million in damages. The court of appeal reversed the judgment, however, and decertified the class, finding that the "sampling" method was improper.

Bank entrenched in wage-and-hour class action

A class of 260 current and former "business banking officers" (BBOs) sued U.S. Bank, claiming it misclassified them as exempt "outside salespersons" and failed to pay them overtime. BBOs are responsible for developing and managing the bank's small business relationships by selling financial services, prospecting, networking, and cross-selling. To qualify as an exempt outside salesperson under California wage and hour law, each BBO must customarily and regularly spend more than half of his working time engaged in sales activities off bank property. The bank asserted that the BBOs were required to — and did — spend more than 80 percent of their time selling outside the branch offices, and thus, they were properly classified as exempt.

In an effort to streamline the lawsuit, the court devised a phased trial in which the bank's classwide liability and damages would be determined via a "sampling" — 20 randomly selected class members, deemed the random witness group (RWG), who would testify at trial as representatives of the entire class. There was no statistical or legal basis for the court's decision to sample 20 out of 260 class members. At all times, the bank objected that the "sampling" was unreliable and deprived it of its constitutional right to due process because it was prevented from defending against each class member's claim for damages.

At trial, 19 RWGs and two named class members testified that they spent more than half of their working time in the bank branch offices and worked varying amounts of overtime. The bank attempted to introduce testimony of non-RWG class members who spent the majority of their working time outside the branch offices and/or did not work overtime. The trial court refused to consider that evidence and instead found the RWGs — who worked an estimated average of 11.86 overtime hours per week — to be representative of the entire 260-person class.

Based on that finding of liability and the resulting calculation of damages, the

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court entered judgment in the amount of $14,959,565 against the bank. The bank appealed, and the court of appeal reversed the trial court's decision and decertified the class.

Class 'sampling' violated bank's due process rights

Due process principles demand that litigants have a fundamentally fair chance to present their side of the story at trial. In this case, the trial court erred when, in the interest of expediency, it set ground rules that prevented the bank from defending itself against the claims of the 260 class members. The only way to determine with certainty if an employee spent time inside or outside the office or worked overtime would be to examine each employee's practices individually. The trial court allowed only 21 class members to testify, even though the bank offered evidence that would have prevailed against a significant number of class members, either because they regularly spent more than half of their working time off bank property, thus classifying them as outside salespersons exempt from overtime wages, or because they never worked overtime.

Further, the faulty method of representative sampling adopted by the court resulted in a 43.3 percent margin of error, which had the potential to nearly *double* the bank's liability due to statistical error. Such an unreliable method of evidentiary proof violated the bank's constitutional due process rights and was not a valid method of determining classwide liability for unpaid overtime. The appellate court found that if it weren't for the trial court's improper use of "sampling," the bank would have received a more favorable result at trial.

Court of appeal decertifies the class

Class actions are authorized when there is a question of common or general interest of many people and it's impractical for each person to sue individually when one or more class representatives may sue or defend for the benefit of all the class members. A class action may be "decertified" if a defense would raise issues specific to each potential class member that predominate over the common issues.

When determining whether overtime laws have been violated and reviewing employer policies applicable to the entire class, courts must ask where and how each individual class member spent his time. In this case, there were 260 BBO class members, most of whom performed their work in different ways or locations and worked a variety of hours. The variance in work patterns indicated that individual issues of fact predominated over common issues among the class members. Accordingly, the appellate court found the need to splinter the class into individual trials, thus warranting decertification. *Duran v. U.S. Bank National Association* (California Court of Appeal, First Appellate District, 2/6/12).

Bottom line

Class wage-and-hour litigation is a potentially dangerous weapon that can be deployed on behalf of a number of workers who hold the same job for a large employer. However, the law imposes strict requirements for certification of a "class" of employees. Similarly, if a class intends to offer representative testimony on behalf of all its members, strict statistical standards must be met. In many — and perhaps most — cases, courts must examine the claim of each employee individually. Courts welcome creative methods for streamlining and effectuating the class-action process, but those methods cannot cut corners in a way that infringes on the due process rights of employers.

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THE PUBLIC SECTOR

Doing the right thing on pensions (isn't easy or obvious)

by Jonathan Holtzman

California's pension roller derby has been picking up speed. The "Pension Reform Act" would have made sweeping pension changes, but it was withdrawn by its sponsors after the attorney general's ballot summary and title were released. The summary stated, among other things, that the measure would "eliminate constitutional protections for current and future public employees' vested pension benefits."

Simultaneously, the governor's office released draft statutory and constitutional language for his "12-point" pension reform initiative, which requires current employees to split the "normal cost" of pensions with the employer on a 50/50 basis. That would be real progress. Both measures contemplate constitutional amendments and therefore require voter approval.

Complex issues

Those who watch pension issues are beginning to wonder how the dispute is going to work out for the best, and the public has no idea what to believe. Vested rights. Amortization. Unfunded liability. Normal cost. Discount rates. Defined benefits. Hybrid plans. Spiking. Two-tiered retirement plans. Fiduciary duties. Before voters can make an informed judgment, they will need to take a Berlitz course in pension-speak.

But a few things are becoming clear:

- Almost everyone supports reduced benefits for *future* public employees, but those savings are far in the future, especially because most public agencies are downsizing. The emerging consensus is, above all else, that the risks associated with pension plans should be shared by employees and the employer.
- The big legal and politcal issue is what to do about the future benefits of current public employees. On the legal side, everyone agrees that benefits already earned are generally vested. But what about future accruals of benefits and the amount employees contribute to pensions? Can those be changed for current employees when they are specified under charter or other law?
- Despite many good features, Governor Jerry Brown's measure doesn't deal with the cost of paying for the enormous unfunded liability that has arisen in public pension plans due to large retroactive increases in benefits and the pension plans' failure to achieve projected returns. The governor's initiative increases current employees' pension *contributions*. But the plain truth is that no one — public employers, employees, or taxpayers — has enough money to keep pensions afloat without some prospective *benefit* changes affecting current employees.
- The law of vesting is at the center of the roller derby. California courts' take on vesting law — the extent to which the government is contractually bound to maintain benefits for current employees — is stricter than most. The issue is ripe for a *simple* citizen initiative with a clear summary that doesn't say vested rights are being *"eliminated*."

My two cents: The core issue — which was one small but critical part of the withdrawn citizen initiative — is amending the California Constitution to expressly permit reasonable, limited prospective changes in benefits and contributions for current employees. For example, perhaps police and fire pension plans should be subject to prospective change only when the plan is funded at less than 80 percent (based on market valuation) or the employer contribution exceeds, say, 25 percent of pensionable compensation, or both. For nonsafety employees, the employer contribution limit presumably would be lower.

Bottom line

We are running out of time and options. Although the point is sometimes lost in the debate, employees also have an interest in making sure their benefits are adequately funded and jobs aren't vaporized or employee contribution rates increased dramatically to feed the pension beast.

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➞ *You can catch up on the latest court cases involving class claims in the subscribers' area of www.HRhero.com, the website for California Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 50 Employment Law Letters. Need help? Call customer service at (800) 274-6774.* ✤

CONSTITUTIONAL RIGHTS

Prop 8's ban on same-sex marriages was unconstitutional

by Cathleen S. Yonahara

On February 7, the Ninth Circuit Court of Appeals (whose decisions apply to California employers) ruled that Proposition 8, a voter initiative amending the California Constitution to ban same-sex marriage, was unconstitutional. The court held that Prop 8 impermissibly took away from same-sex couples the right to marry, which they already had under California law. What does that ruling mean for California employers?

The roller coaster ride

In November 2000, California voters passed Prop 22, a voter initiative that amended the California Family Code by providing that only marriage between a man and a woman is valid in California. In 2004, same-sex couples and the city and county of San Francisco filed complaints in California state courts alleging that Prop 22 violated the California Constitution. In May 2008, the California Supreme Court held that Prop 22 impermissibly denied same-sex couples the fundamental right to marry and equal protection of the laws under the California Constitution.

In November 2008, California voters passed Prop 8, a voter initiative that amended the California Constitution to provide, "Only marriage between a man and a woman is valid or recognized in California." In May 2009, the California Supreme Court upheld Prop 8 but left intact the 18,000 marriages of same-sex couples performed after its 2008 decision and before the passage of Prop 8.

Two same-sex couples then filed a lawsuit claiming that Prop 8 violated the U.S. Constitution. Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California ruled that Prop 8 was unconstitutional. After resigning from the bench, Walker disclosed that he is gay and has a long-term relationship with another man. Prop 8 proponents asked the district court to toss out the judgment on the grounds that the chief judge should have recused himself because his impartiality might be questioned. The district court denied the request, and this appeal followed.

Ninth Circuit's ruling

The Ninth Circuit affirmed the district court's ruling that Prop 8 was unconstitutional and held that the court did not abuse its discretion in refusing to set aside its ruling based on Walker's undisclosed same-sex relationship. The Ninth Circuit's decision to overturn Prop 8 wasn't based on a fundamental right for gays and lesbians to marry. Rather, the decision was based on a 1996 U.S. Supreme Court case, *Romer v. Evans,* which struck down a Colorado law enacted via referendum to prevent the state and local governments from enacting measures to protect gays and lesbians from discrimination. The Supreme Court overturned the Colorado law on the grounds that it "withdraws from homosexuals, but no others, specific legal protection." Similarly, the Ninth Circuit reasoned, Prop 8 unfairly singled out gays and lesbians by taking away a legal right they already had under the California Constitution, as previously recognized by the California Supreme Court.

Furthermore, Prop 8 denied same-sex couples the important designation of "marriage," even though they already had the legal protections of marriage through domestic partnership laws. The Ninth Circuit found that the designation of "marriage" awards "a societal status that affords dignity to those relationships." According to the court, Prop 8 "serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for 'laws of this sort.'" The Ninth Circuit concluded that Prop 8 violated the Equal Protection Clause of the Fourteenth Amendment. *Perry v. Brown* (U.S. Court of Appeal, Ninth Circuit, 2/7/12).

What happens next?

The story doesn't end here. On February 21, Prop 8's legal supporters asked the Ninth Circuit for an *en banc* review of the three-judge-panel ruling striking down Prop 8 as unconstitutional. If a majority of the Ninth Circuit's judges agree to reconsider the case, it would be assigned to a panel consisting of the chief judge and 10 randomly selected circuit court judges. Ultimately, this case may be appealed to the U.S. Supreme Court.

Bottom line

California law already requires that registered domestic partners be treated the same as spouses and expressly prohibits discrimination based on sexual orientation and marital status. The California Domestic Partner Rights and Responsibilities Act grants registered

domestic partners the same rights, benefits, duties, and responsibilities that spouses have under California law. Accordingly, employers must generally treat same-sex couples the same as spouses for purposes of protected leaves of absence (such as leave under the California Family Rights Act and military spouse leave), kin care, and other employee benefits.

Regardless of how this Prop 8 roller coaster ride finally ends, you must ensure that you don't discriminate against an employee based on marital status, actual or perceived sexual orientation, or association with gays or lesbians. You should provide to employees with registered domestic partners and same-sex spouses the same benefits that you give to employees with opposite-sex spouses.

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EMPLOYMENT CONTRACTS

A deal is a deal! Unless, of course, a court disagrees

by Lyne A. Richardson and Michelle Rapoport

Contracts often contain a "choice-of-law" provision — an agreement to apply another state's law to the disputes involving the contract. In the employment arena, however, even when a contract designates that another state's law governs disputes over its terms, a court may invalidate the provision if California law provides greater protections to workers than the designated state's laws. In a recent case, the Ninth Circuit held that choice-of-law provisions are not enforceable when California has a strong interest in applying its own more employee-friendly law to employment disputes.

Facts

At the heart of this case are an Independent Truckman's Agreement and an Equipment Lease Agreement between Affinity Logistics Corporation, a transportation company, and the drivers who make its deliveries. The agreements include two contentious provisions. First, they specify that the drivers perform services for Affinity not as employees but as independent contractors. Second, they include a choice-of-law provision that states Georgia law will govern any disputes. The drivers entered into the agreements in California, where they also perform services for Affinity.

A driver filed a class-action lawsuit against the company alleging wage and hour violations, including overtime, failure to pay wages, and other similar violations of California law and the federal Fair Labor Standards Act (FLSA). Liability for the alleged violations hinged on whether the drivers were considered employees of Affinity or independent contractors.

The trial court concluded that Georgia law applied to the agreement and the drivers were considered independent contractors, not employees, under Georgia law. First, the court reasoned that a choice-of-law provision is enforceable when the state specified in the agreement has a substantial relationship

AGENCY ACTION

NLRB calls certain mandatory arbitration agreements unlawful. The National Labor Relations Board (NLRB) has ruled that it's a violation of federal labor law to require employees to sign arbitration agreements that prevent them from joining together to pursue employment-related legal claims in any forum, whether in arbitration or in court. The NLRB's decision examined one such agreement used by a nationwide homebuilder under which employees waived their right to a judicial forum and agreed to bring all claims to an arbitrator on an individual basis. The agreement prohibited the arbitrator from consolidating claims, fashioning a class or collective action, or awarding relief to a group or class of employees. The Board found that the agreement unlawfully barred employees from engaging in "concerted activity" protected by the National Labor Relations Act.

EEOC task force expands outreach to small businesses. The Equal Employment Opportunity Commission (EEOC) has launched the Small Business Task Force aimed at collaborating with the small-business community to ensure compliance with federal antidiscrimination laws. The task force is to develop recommendations on how to use technology to expand outreach to small businesses, develop technical assistance and training initiatives for small businesses, identify specialized approaches to aid small businesses owned by women and minorities, identify specialized approaches for micro businesses (generally those with 50 or fewer employees), and enhance small-business information and training on the EEOC's website. The panel plans to focus on newly established small businesses and those that are too small to afford lawyers or HR personnel.

Corporate culture blamed in mine disaster. The U.S. Department of Labor's Mine Safety and Health Administration's report accompanying a record-setting fine concludes that corporate culture was the root cause of the April 2010 explosion at the Upper Big Branch-South Mine in West Virginia, which killed 29 miners and injured two, the worst U.S. coal mining disaster in 40 years. The agency imposed a fine of $10,825,368 after its investigation into the explosion at the mine, which was operated by Performance Coal Co., a subsidiary of Massey Energy Co. The agency's presentation of findings, announced in December, followed a nonprosecution agreement reached among the U.S. Attorney's Office for the Southern District of West Virginia, the U.S. Department of Justice, Alpha Natural Resources Inc., and Alpha Appalachia Holdings Inc., formerly known as Massey Energy Co. The agreement dissolves criminal liability for Alpha but doesn't provide protection against criminal prosecution of any individuals. ✤

to the parties in the transaction. Because Affinity was incorporated in and had its principal place of business in Georgia, the court concluded it had a substantial relationship to that state.

Georgia law presumes independent contractor status. The party seeking to prove an employment relationship exists must provide sufficient evidence to overcome that presumption. Since the driver who filed the claim couldn't overcome the presumption, the court concluded he was an independent contractor. The driver appealed the court's ruling.

But we had a deal!

The Ninth Circuit disagreed with the trial court's analysis. The court of appeal concluded that the trial court used the wrong analysis to determine the enforceability of the provision in the agreements designating that Georgia law governed any disputes.

To determine whether a choice-of-law provision is enforceable, a California court considers three factors. First, the court looks at whether the state selected by the parties has a "substantial relationship" to the parties or whether the parties have an otherwise "reasonable basis" to select the state. Second, the court should consider whether applying the law of the state specified in the agreement would be contrary to an important public policy of California. Finally, the court should evaluate whether California has a substantially greater interest in the resolution of the dispute than the state designated in the agreement. The trial court's conclusion was faulty because it didn't evaluate the last two factors.

The Ninth Circuit concluded that the choice-of-law provision in the drivers' agreements wasn't enforceable. First, Georgia law is contrary to the fundamental policy of California because parties in Georgia may agree to independent contractor status and courts typically do not disturb that designation. In California, by contrast, almost any work performed for an employer is presumed to create an employment relationship. To overcome that presumption, the employer must show the relationship is an independent contractor relationship. Therefore, Georgia law undermines a California law that aims to protect its workers.

The Ninth Circuit also concluded that California has a significantly greater interest in the outcome of this case than Georgia. To decide which state has a more significant interest in the case, the court weighs several factors: (1) the place the contract was entered into, (2) the place the contract was negotiated, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of incorporation and place of business of the parties. In this case, the parties' only connection to Georgia was that Affinity was incorporated there. More important, however, the drivers agreed to the contract in California, they worked in California, the contract dealt with deliveries in California, and the drivers lived in California. According to the Ninth Circuit, all of those factors weighed in favor of using California law to resolve the dispute.

California law provides workers with protections often unavailable in other states.

Still, the Ninth Circuit didn't determine whether the drivers were independent contractors. It merely stated that the lower court must go back and examine the question under California law. *Ruiz v. Affinity Logistics* (U.S. Court of Appeal, Ninth Circuit, 2/8/12).

Bottom line

Although choice-of-law provisions are frequently used by companies that are incorporated outside California but do business here, this case demonstrates the limited value of the provisions in the employment context. California law provides workers with protections often unavailable in other states, and courts routinely refuse to enforce contractual provisions that undermine those protections.

Remember that an independent contractor designation in an agreement is not conclusive. While having an agreement that designates an independent contractor rather than an employment relationship is useful, you should carefully examine the nature of the relationship to make sure it meets California's multifactor test for determining whether a worker is truly an independent contractor or an employee. As this case shows, improperly designating employees as independent contractors could lead to significant liability under California's wage and hour laws.

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GUEST COUNTERPOINT

A very, very, very fine ruling against 'emergency' power grab

by David E. Mastagni

Editor's note: *In our January 23 issue, Jonathan Holtzman wrote about a dispute (in which he is counsel) between the city of Stockton and its police union and why and how financially beleaguered cities might need relief from contractual obligations. (See "A very, very, very fine house: the sequel," page 7.) The opposite perspective is presented below by the union's attorney. Neither view necessarily reflects the opinion of this publication or its editors.*

The men and women of the Stockton Police Department recently won a nationally significant ruling dismissing the city of Stockton's lawsuit to force them to renegotiate their labor contract based on a purported fiscal emergency. Fox Business News recorded the proceedings, and Tom Sullivan sided with the police on his show.

Contracts Clause

The Contracts Clause in the U.S. Constitution protects property rights by constraining public entities from "impairing the obligation of contracts." Historically, impairments were limited to enactments for policing the public good and morale. The city of Stockton wants the ability to balance its budgets by impairing the financial terms of its own contracts, despite U.S. Supreme Court rulings that the government "cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money" for public purposes rather than pay its creditors. Moreover, in the last 40 years, no Ninth Circuit or Supreme Court case has upheld an impairment of "a financial term of an agreement to which a state entity was a party."

Background

In early 2010, months after executing a police labor contract, Stockton declared a "fiscal emergency" and refused to honor its agreement. After rejecting offered concessions, in 2011 Stockton imposed severe impairments that totaled about 30 percent and drove officers into foreclosure, bankruptcy, and a mass exodus. Stockton expects to save about $10 million from its emergency actions but has already spent $2 million on outside attorneys and budgeted $1.5 million more. Through its emergency declaration, Stockton claims inherent self-help debt-relief powers without the judicial oversight of bankruptcy or having to negotiate with creditors. Rather than satisfying its obligations, the city funded management raises and luxuries such as the marina, arena, ballpark, and many redevelopment projects. As public safety suffered — murder rates reached new highs and police staffing dwindled — the big-spending city manager responded by hiring a $150,000 consultant to oversee a committee to issue safety recommendations for the next year.

The police sued to enforce their contract. Stockton countersued, seeking to validate its contract impairment and compel renegotiation, which would allow it to declare an impasse and impose changes without agreement. This attempt to establish a right to force contract modifications by declaring an emergency would bar the police from enforcing the original agreement or challenging Stockton's actions. To distract from its novel power grab, the city claimed the officers' purchase of rental property near the city manager amounted to bad-faith bargaining.

Court's ruling

The police filed motions to dismiss Stockton's cross-claims, asserting the claims were unavailable under the law. The police also asked the court for protection from the city's attempt to obtain discovery (documents and information exchanged before trial) that the police deemed abusive.

The court tossed Stockton's claim to establish emergency powers and impair its financial obligations but granted the city permission to amend its claim. It also ruled the police had no obligation "to discuss or renegotiate terms of a closed contract, notwithstanding Stockton's declaration of fiscal emergency" and were "within [their] rights to refuse" and appointed a referee to resolve the discovery issues. It also allowed Stockton to try to prove harassment relative to the house purchase — a moot point, as the property has long been rented.

Conclusion

By preventing the city from tearing up its contract, the ruling represents an important first step in constraining Stockton to the rule of law. Given that local governments will always spend beyond their means, the Contract Clause remains an important safeguard of property rights.

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WORKPLACE TRENDS

Study shows rise in "consumerization of corporate IT." Employees who bring their own devices and applications into the workplace represent one of the biggest challenges and opportunities facing employers in the next five years, according to survey research from Accenture, a global management consulting, technology services, and outsourcing company. The survey included more than 4,000 employees in 16 countries as well as more than 300 business and IT executives. The study showed 45 percent of the employees surveyed said that personal consumer devices and software applications are more useful than the tools and applications provided by their IT department. Despite employer concerns about data security and IT protocol, 23 percent of employees worldwide regularly use personal consumer devices and applications for work-related activities.

Report examines effect of aging workforce on workers' comp costs. The National Council on Compensation Insurance, Inc. (NCCI), which manages a database of workers' compensation insurance information, has conducted research examining the potential adverse impact on workers' comp loss costs as baby boomers postpone retirement and accelerate the aging of the workforce. In terms of loss costs per worker, the major difference among age groups was found to occur between the 25 to 34 and the 35 to 44 age groups. All groups of workers age 35 to 64 appear to have similar costs per worker. NCCI calls those findings reassuring since the aging workforce may have less of a negative impact on loss costs per worker than originally thought.

Survey predicts fewer staff cutbacks in 2012. Just three percent of respondents to a national survey expect significant staff cutbacks and restructurings this year, according to a survey by Right Management, the talent and career management group within ManpowerGroup. Two-thirds of those responding expect almost no cutbacks. The survey polled senior executives at more than 600 firms across the United States representing government, nonprofit, public, and private organizations. Asked about expected hiring in 2012, one in five respondents predicted stepped-up hiring to drive strategic growth.

Think you've heard them all? Check out these excuses. Online career site CareerBuilder surveys employers annually to collect a list of the most outrageous excuses employees give for coming in late. The most recent poll includes these gems: One employee's cat had the hiccups, another employee thought she had won the lottery (she didn't), one employee believed his commute time should count toward work hours, and another said he wasn't late because he had no intention of getting to work before 9:00 a.m. even though his start time was 8:00 a.m. ✤

PROTECTED ACTIVITY

Postdischarge misconduct makes employee unfit for reinstatement

by Cathleen S. Yonahara

In this case, the National Labor Relations Board (NLRB) found that an employer had unlawfully terminated an employee for engaging in protected concerted activities related to its decision not to grant a wage increase. However, several months later, he launched a profanity-laced tirade at a current employee. How was his postdischarge misconduct relevant to his unfair labor practices claim? Read on to find out.

Worker fired after complaining about wages

Jack Wallace was a child-care worker at Human Services Project (HSP), a residential care facility for behaviorally challenged youths. Around January 2010, HSP informed employees that a lawsuit filed against the state of California could result in benefits to them.

On May 28, 2010, HSP held a staff meeting, during which the chief financial officer, Craig Fredericks, expressed concerns about delays in the counties' payments from the successful lawsuit. Fredericks said that employees whose wages were cut in February 2009 would have their wage rate restored, but HSP wasn't yet able to grant any raises or back pay. Wallace stated that employees were concerned about the promised retroactive pay and raises and encouraged Fredericks to grant raises. He said that HSP's low wages made it difficult to find and retain qualified employees and claimed that HSP was cutting corners in staffing. After Wallace spoke up, other employees shared concerns about their wages.

On June 1, Wallace wrote a letter to the board of directors reiterating his position that HSP had promised employees wage increases and requesting financial information and minutes of board meetings. He distributed copies of his letter to other employees. At the staff meeting on June 4, the program director, Margo Castaneda, said that the board would be responding to Wallace's letter, the board's meeting minutes could be reviewed in Fredericks' office, and HSP's financial information was available online. She also told employees, "[I]f you're disgruntled, if you don't want to work here[,] you can just leave."

After the meeting, the facility manager, Grover Crump, called Wallace and stated that he and Castaneda wanted to meet with him on June 7. Wallace asked what the meeting was about, and Crump said it was related to his June 1 letter to the board. Wallace replied that he was uncomfortable with a meeting and didn't think it was necessary since he was expecting a response from the board. Crump didn't say that the meeting was mandatory or that Wallace would be disciplined if he failed to attend.

On June 11, Wallace was called in from the staff meeting to meet with Fredericks and HSP's executive director. The executive director notified Wallace that he was being discharged for insubordination but wouldn't provide any specifics. Wallace

claimed that HSP had no basis to fire him and refused to accept the envelope containing his termination letter and final paycheck.

As Wallace was walking back to the staff meeting, Fredericks told him that HSP would call the police if he didn't leave the premises. Wallace threatened, "I am not leaving, and if you expect me to leave, you are going to have to come and make me leave this facility." He then gestured toward Fredericks to come and fight. When a police officer arrived, he gave Wallace the option of leaving the premises or being arrested. Wallace refused to leave and was arrested.

On November 16, Wallace approached HSP's bookkeeper, Kay Tiffany, at a post office and "engaged in a profanity-laced tirade." He followed her to her car, calling her "a criminal and a f_____ bookkeeper." When she attempted to close her car door, he grabbed the door and wouldn't let go. She was eventually able to close the door and drive to work.

Did Wallace's discharge violate the NLRA?

The National Labor Relations Act (NLRA) prohibits employers from discharging employees for engaging in protected concerted activities. The NLRB held that HSP unlawfully discharged Wallace because of his protected concerted activities involving its decision not to grant a wage increase. Furthermore, Castaneda's statement to employees that they should quit their employment if they were unhappy with the working conditions constituted an unlawful implied threat to discharge workers for engaging in protected concerted activities.

However, the NLRB found that Wallace's misconduct toward Tiffany on November 16 involving a matter unrelated to his discharge rendered him ineligible for reinstatement and back pay as of that date. Accordingly, the NLRB ordered HSP to pay Wallace back pay with interest from the date of his termination until November 16, 2010.

Bottom line

This ruling is very instructive for employers. First, it serves as a reminder that you can't fire employees for voicing concerns about the wages they and their coworkers are paid. Second, you should take note that the NLRB found that the employer in this case had *implicitly threatened* to terminate employees for engaging in concerted activities by telling them at a staff meeting that they could quit if they were disgruntled about their wages. Finally, an employee's posttermination misconduct may render him ineligible for reinstatement and back pay after the date of the misconduct.

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CALIFORNIA NEWS IN BRIEF

California joins federal misclassification initiative. California has become the 12th state to sign a memorandum of understanding with the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) aimed at fighting employee misclassification. "California is proud to enter into this partnership with the [DOL] to work together to attack the problems of the underground economy," Labor Commissioner Julie A. Su said at the signing on February 9. In 2011, the WHD collected more than $5 million in back wages for minimum wage and overtime violations under the Fair Labor Standards Act (FLSA) that resulted from employees being misclassified as independent contractors or otherwise not treated as employees, according to a statement from the DOL.

Workplace explosion citations total $540,890. The California Department of Industrial Relations' Division on Occupational Safety and Health (Cal/OSHA) has issued 28 citations with penalties totaling $540,890 after an investigation of the August 9, 2011, explosion in Sylmar that injured three people, two critically. Investigators found violations at three firms, including 18 serious and six willful citations. The citations were issued to Rainbow of Hope, AKA Rainbow of Hope Foundation, Strategic Sciences, Inc., and Realm Catalyst.

The explosion occurred when a pressure vessel containing compressed gas, including oxygen and hydrogen, exploded while workers were transferring hydrogen and oxygen gas from one cylinder to another. The explosion took the arm and leg of one worker and seriously injured another. Another worker suffered minor injuries. Cal/OSHA said the employers failed to correct hazardous conditions that had been identified in two earlier explosions, including one that resulted in the death of a worker in Simi Valley in 2010.

Settlement reached in restaurant wage cases. The state labor commissioner has reached a $316,000 settlement in eight wage cases that were filed to recover unpaid minimum wages and overtime at Pho Clement and Pho Clement 2 restaurants in San Francisco. The settlement follows an investigation that began in June 2011. The employers are required to pay each of the eight employees an amount ranging from $17,432 to $85,114 depending on how much they were owed in unpaid wages. ✤

UNION ACTIVITY

NLRB says symphony workers are eligible for union vote. The National Labor Relations Board (NLRB) has found that musicians playing for symphony orchestras in Pennsylvania, Massachusetts, and Texas are employees, not independent contractors, and therefore are eligible to vote on whether they want union representation. In a 2-1 decision issued on December 27, 2011 — when the NLRB had just three members, the minimum for a quorum — the Board reversed the regional director's decision to dismiss an election petition and sent the case back to the region for further action. The Board found that many factors weighed in favor of employee status. It noted that orchestra management set work hours, payment schedules, dress codes, and standards for behavior, among other things. It also found that the musicians don't enjoy entrepreneurial opportunity or suffer risk because their fees are set and can't be negotiated.

Union pension plan takes aim at Wall Street. The American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) Employees Pension Plan announced in January it had filed 21 shareholder proposals aimed at requiring greater director accountability, independent corporate board leadership, and greater transparency in the companies in which the plan invests. "On Wall Street, the model of the imperial CEO who also serves as board chair has proven to be a failed experiment," said Gerald W. McEntee, AFSCME president. "Our independent chair proposals are designed to make these boards un-beholden to an all-powerful CEO and chair and more accountable to their owners, the shareholders." The AFSCME plan is an institutional shareholder with more than $850 million in assets

Union applauds planned rule change affecting immigrants. The United Farm Workers Foundation has announced its support of the U.S. Department of Homeland Security's planned rule change regarding waivers of inadmissibility for certain immigrant relatives of U.S. citizens. The organization said the change will benefit the spouses, children, and parents of American citizens who have overstayed their visas or who have remained in the United States after an unlawful entry and can prove through a waiver application that their inability to obtain permanent resident status would cause extreme hardship to a U.S. citizen spouse or parent. The foundation says it knows of many family members of U.S. citizens who choose not to apply for permanent residence for fear of being separated from their families in the United States for an extended period of time. The foundation says the rule change would reduce the amount of time citizens are separated from their immigrant family members during the waiver application process. ✤

ALTERNATIVE DISPUTE RESOLUTION

Ninth Circuit upholds arbitration award against former employee

Courts will second-guess arbitration awards only in very narrow circumstances. How the two sides to a dispute view the finality of an award depends, of course, on which side prevailed at the arbitration. For Toyota, it was good news when the Ninth Circuit affirmed a lower court's ruling in the company's favor.

Postemployment claims arbitrated

Dimitrios Biller spent four years as an in-house lawyer for Toyota Motor Sales, a subsidiary of Toyota Motor Corp. He was responsible for product liability matters. In 2007, he claimed he was being constructively discharged because of Toyota's allegedly unethical discovery practices in litigation.

Ultimately, Biller and Toyota parted ways under a severance agreement in which Biller released all claims and agreed to protect, return, and not copy Toyota's confidential information. Also included was a provision requiring that any disputes be resolved through arbitration with the Judicial Arbitration and Mediation Services (JAMS).

After leaving Toyota, Biller started a litigation consulting business. On his website, he used information about his work at Toyota that the company considered confidential. Toyota went to court for a temporary restraining order and injunction against Biller, and he countered by seeking the same against the company. At that point, the court at Toyota's request ordered the parties to arbitrate their differences, as required by the severance agreement.

Toyota claimed that Biller had violated his agreement, converted company information for his own use, and committed computer fraud. Biller had his own set of claims against Toyota: violation of the Racketeer Influenced and Corrupt Organizations Act, constructive discharge, intentional infliction of emotional distress, defamation, interference with his business, unfair competition, and fraud.

The JAMS arbitrator held a two-week hearing in November 2010. Ultimately, he ruled in Toyota's favor on all its claims. As specified in the severance agreement, the arbitrator awarded Toyota $2.5 million in liquidated damages and $100,000 in punitive damages. He also concluded that the company was entitled to a permanent order barring Biller from misusing its confidential information.

Toyota went to federal court for an order to enforce the arbitrator's award. Biller objected that the arbitrator had disregarded California law, had failed to provide an adequate written ruling, and was biased in Toyota's favor. All those arguments failed, and the trial court affirmed the arbitration award against Biller. He appealed to the Ninth Circuit.

Review of award limited

The Ninth Circuit took a fresh look at the arbitration award but noted that its review was very limited under the Federal Arbitration Act (FAA). The parties had provided in the severance agreement that California law would govern most aspects of any disputes but that the FAA would control the arbitration clause. The clear language of the agreement meant the court could modify or toss out the arbitration award only for a reason allowed by the FAA, such as fraud, corruption, or evident partiality.

Biller raised a string of arguments, including that the arbitrator had ignored the law and exceeded his authority. But one by one, the court disposed of his arguments, repeatedly noting that its review was limited. Ultimately, the Ninth Circuit concluded that the arbitrator had adequately documented the reasons for his rulings and had addressed the points of California law advanced by Biller. Therefore, it upheld the arbitration award. *Biller v. Toyota Motor Corp.*, Case No. 11-55587 (9th Cir., Feb. 3, 2012).

Understand the finality of arbitration

You may be applauding this decision and thinking about adopting — if you haven't already — some form of arbitration to resolve any disputes with your employees. But the decision highlights an important feature of arbitration that should be considered, and that's the finality of an arbitrator's ruling. It's great when the employer prevails in arbitration, as Toyota did in this case, and the court can't second-guess the decision. Remember that if the employee wins at arbitration, the court's review is just as limited. Arbitration in some situations could be more final than you might like. ✤

HIRING

Unemployed need not apply

The national media has stirred up a brouhaha about some employers that have indicated that the unemployed need not apply for vacant positions. Given the controversy, we thought We would offer both the legal and practical considerations of having such a policy.

Legal implications

On the surface, an "unemployed need not apply" policy seems insensitive, if not cruel, given the high rate of unemployment throughout our nation. Neither federal nor state law currently extends protection to individuals based solely on their employment status. However, a California bill introduced on January 5 would prohibit hiring discrimination against the unemployed. Although the bill would not allow applicants to sue for discrimination, employers that violate the proposed law would be liable for fines up to $10,000. Furthermore, there are obvious business reasons for hiring an employed worker away from another employer rather than hiring someone who's unemployed.

Yet since the passage of Title VII of the Civil Rights Act of 1964, you must ensure your policies and procedures don't have an unintended "disparate impact" on a particular workplace group. In lay terms, "disparate impact" is unintended discrimination resulting from a policy or decision that disproportionately and negatively affects a protected group.

Neither federal nor state law currently extends protection to individuals based solely on their employment status.

To understand disparate impact, think about an employer that hires only college graduates, even though a college degree isn't necessary for an employee to successfully perform the job. In that circumstance, the "college degree" requirement may have a disparate impact on a protected category of applicants (*e.g.*, based on race, sex, religion, national origin, or age). When that happens, the Equal Employment Opportunity Commission, the National Organization of Women, or the National Association for the Advancement of Colored People may choose to fund a test case challenging your hiring practices.

Legally speaking, if you don't want to hire a lawyer to defend a test case (which could find its way to the U.S. Supreme Court), you may wish to think hard about announcing a policy that states you have joined the growing ranks of employers that judge applicants based on their employment status. It's important to note that federal legislation has been introduced to protect the unemployed. While it isn't likely to go anywhere, the fact that it was introduced shows the concern many have about the issue.

Practical considerations

Let's consider the practical aspects of an "unemployed need not apply" approach. Starting in 2008, our national employment ranks were ravaged by reductions in force. Yet for the most part, those who ended up unemployed were less skilled, less experienced, or in some cases, poor attendees or poor performers. In short, they were employees who had repeated safety problems or were often caught not doing what the employer had a right to expect of them. Regardless of the reason, it's undeniable that more often than not, individuals who were laid off in 2008 and 2009 were less desirable workers.

Accordingly, why would a California employer with a good job opportunity not choose a more experienced,

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more skilled, and more productive applicant over a less experienced, less skilled, and less productive one? It wouldn't, and it shouldn't have to. It makes sense that you would want to hire an employed applicant over an unemployed one.

Furthermore, although an "unemployed need not apply" approach seems cruel at first, in a period of tragically high unemployment, it isn't. Having such a policy encourages a motivated worker to seek a better job. Assuming the vacancy you have is enough to attract an employed worker, he'll probably expect better wages and benefits, allowing him to move up the economic ladder. Of course, if the position's not attractive enough, then the employed worker won't apply, and you'll be forced to consider hiring the best of the unemployed.

If an employed worker fills a vacancy for which an unemployed applicant wasn't welcome, then the movement by the employed worker creates a vacancy for an unemployed worker. Eventually, employers will seek out the unemployed to fill positions vacated by the employed. That will allow unemployed workers to get back to work and sharpen their work skills and habits that were dulled by an extended period of unemployment.

Once the economy recovers and unemployment returns to "normal" levels, all workers will again be judged on their skills, qualifications, and work habits. In 2008, it was a worker's market. Total compensation packages rose, and everyone profited from a more robust economy. Yet with the economic crash of 2008 and the unfortunate sustained period of unemployment, it has become an employer's market for labor. The pendulum clearly moved. We should hope — and expect — it to later move back in the other direction. As it does, it will affect both the employed and the unemployed positively and create more, not less, opportunity.

Bottom line

Accordingly, an "unemployed need not apply" policy isn't nearly as cruel as it's made out to be. Even so, you should be careful when considering whether you want to announce you are subscribing to a policy that the unemployed are not welcome applicants. Rather, you may simply want to judge applicants based on their present skills, abilities, and work habits, which may include some judgment about whether they have greater skills and abilities because they are currently employed. Doing so may be less risky than going forward with a bold blanket policy. ✤